Yew Siew Hoo & Ors v Nikmat Maju Development Sdn Bhd and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS N-02–2894–12 OF 2012 AND N-02–2967–12 OF 2012
AZIAH ALI, LIM YEE LAN AND ROHANA YUSUF JJCA
16 JANUARY 2014

Civil Law Act — Contract — Frustrated contract — Application of proviso to s 15(2) of the Civil Law Act 1956 — Whether section wrongly applied in case where contract rendered frustrated — Whether monies paid by one party to other under frustrated contract not for expenses incurred by other in performance of contract — Whether evidence showed party that received monies obliged to bear expenses on its own — Whether monies paid should be refunded

The Negeri Sembilan State Government had appointed the respondent in one of the appeals herein, Nikmat Maju Development Sdn Bhd, ('the defendant'), to develop an integrated pig farming area ('IPFA') which involved the construction of a central waste treatment plant ('CWTP') to treat waste water from pig farms. Yew Siew Hoo and 43 others ('the plaintiffs'), who were the appellants in one of the appeals, owned and/or operated pig farms outside the IPFA. The state government allowed farms outside the IPFA to continue operating provided they were connected to the CWTP. The plaintiffs and the defendant entered into tapping agreements ('TAs') under which the plaintiffs could tap into the CWTP if they paid tapping fees. The parties also signed service agreements ('SAs') under which the plaintiffs agreed to pay service charges for the use of the CWTP. Before the CWTP could be commissioned following its construction, an outbreak of the Japanese Encephalitis ('JE') disease caused the state government to ban the rearing and sale of pigs in the area occupied by the plaintiffs. By that time the plaintiffs had already paid the defendant a certain portion of the agreed fees payable under the TAs. The plaintiffs sued the defendant in the High Court for refund of those fees on the ground the TAs had become frustrated by the state government's ban. The defendant, however, counterclaimed for balance of fees unpaid under the TAs and, alternatively, claimed that it should be allowed to use the fees that had been paid to set off the construction costs of the CWTP. Holding that the TAs and SAs had become void and discharged due to frustration, the High Court exercised its discretion under the proviso to s 15(2) of the Civil Law Act 1956 ('Act') to allow the defendant to use the fees that had been paid by the plaintiffs to set-off the construction costs of the CWTP. The defendant's counterclaim was dismissed. In the instant appeals, the trial court's finding that the TAs were void for frustration was unchallenged.

Held:

The trial judge erred in invoking the proviso to s 15(2) of the Act after finding that the construction of the treatment plant was an expense incurred in the performance of the TAs. The evidence showed the defendant was obliged under the IPFA project to build the treatment plant and that it was to bear the costs of construction of the plant (see para 14).

[Bahasa Malaysia summary

Kerajaan Negeri Negeri Sembilan telah melantik responden dalam salah satu rayuan di sini, Nikmat Maju Development Sdn Bhd, ('defendan'), untuk memajukan kawasan penternakan babi bersepadu ('IPFA') yang mana melibatkan pembinaan loji rawatan sisa pusat ('CWTP') untuk merawat air buangan daripada ladang babi. Yew Siew Hoo dan 43 yang lain ('plaintif-plaintif'), yang mana adalah perayu-perayu dalam salah satu rayuan-rayuan di sini, memiliki dan/atau menjalankan penternakan babi di luar IPFA. Kerajaan negeri membenarkan ladang-ladang di luar IPFA untuk terus beroperasi dengan syarat mereka adalah disambungkan dengan CWTP. Plaintif-plaintif dan defendan memasuki perjanjian 'tapping' ('PT') di mana plaintif-plaintif dapat menggunakan CWTP jika mereka membayar fi 'tapping'. Pihak-pihak juga menandatangani perjanjian khidmat ('PK') di mana plaintif-plaintif bersetuju untuk membayar caj-caj khidmat untuk menggunakan CWTP tersebut. Sebelum CWTP boleh dikomisyenkan berikutan pembinaannya, tercetus wabak penyakit Japanese Encephalitis ('JE') menyebabkan kerajaan negeri mengharamkan penternakan dan penjualan babi di kawasan yang diduduki oleh plaintif-plaintif. Pada masa tersebut plaintif-plaintif telah membayar defendan sebahagian tertentu fi yang dipersetujui yang dibayar di bawah PT tersebut. Plaintif-plaintif menyaman defendan di Mahkamah Tinggi untuk bayaran balik fi tersebut atas alasan PT telah dikecewakan oleh pengharaman kerajaan negeri. Defendan walau bagaimanapun menuntut balas untuk baki fi yang tidak dibayar di bawah PT dan, secara alternatif menuntut bahawa ia patut dibenarkan untuk mengguna fi yang telah dibayar untuk set off kos pembinaan CWTP tersebut. Mahkamah Tinggi memutuskan bahawa PT dan PK telah terbatal dan dilepaskan akibat kekecewaan, menjalankan budi bicaranya di bawah peruntukan kepada s 15(2) Akta Undang-Undang Sivil 1956 ('Akta') untuk membenarkan defendan menggunakan fi yang telah dibayar oleh plaintif-plaintif untuk set off kos pembinaan CWTP. Tuntutan balas defendan ditolak. Dalam rayuan ini, dapatan mahkamah perbicaraan bahawa PT adalah terbatal untuk kekecewaan tidak dicabar.

Diputuskan:

Hakim perbicaraan terkhilaf dalam membangkitkan peruntukan kepada s 15(2) Akta selepas mendapati bahawa pembinaan loji rawatan adalah belanja yang ditanggung dalam melaksanakan PT tersebut. Keterangan menunjukkan

defendan bertanggungjawab di bawah projek IPFA untuk membina loji rawatan dan bahawa ia kena menanggung kos pembinaan loji tersebut (lihat perenggan 14).]

Notes

For cases on frustrated contract, see 1(2) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 4466–4467.

Legislation referred to

Civil Law Act 1956 s 15(2)

Appeal from: Civil Suit No 22–149 of 2009 (High Court, Seremban)

William JK Leong (JS Tang with him) (Syalihah Tang & Partners) in Civil Appeal N-02–2894–12 of 2012 for the appellant.

KL Pang (ZT Chok with him) (Cheah Teh & Su) in Civil Appeal N-02–2967–12 of 2012 for the appellant.

KL Pang (ZT Chok with him) (Cheah Teh & Su) in Civil Appeal N-02–2894–12 of 2012 for the respondent.

William JK Leong (JS Tang with him) (Syalihah Tang & Partners) in Civil Appeal N-02–2967–12 of 2012 for the respondent.

Aziah Ali JCA(delivering judgment of the court):

[1] There were two appeals before us, namely, appeal No N-02–2894–12 of 2012 and appeal No N-02–2967–12 of 2012 which were heard simultaneously. The appeals are against the decision of the High Court at Seremban delivered on 31 October 2009 wherein the appellants in appeal No N-02–2894–12 of 2012 were the plaintiffs and the respondent was the defendant. For the purpose of this judgment the parties will be referred to as they were in appeal No N-02–2894–12 of 2012.

[2] In the court below the plaintiffs sought for, inter alia, a declaration that the tapping agreements entered into between the plaintiffs and the defendant dated 15 July 1997 ('the TAs') were void by reason of frustration and claim for refund of fees paid to the defendant under the TAs in the sum of RM868,297.52 together with interests and costs. The defendant counterclaims for the balance of the fees due under the said TAs in the sum of RM1,515,152.48. Alternatively the defendant claims for costs of construction of the Waste Treatment Plant ('WTP') under the said TAs, less the fees paid.

[3] The High Court found that the TAs had become void and were

discharged due to frustration. Consequently the High Court made, inter alia, the following orders:

(a) the TA and the service agreements are declared as void on the ground of frustration of contract;

(b) the sum of RM868,297.52 received by the defendant from the plaintiffs shall be retained by the defendant to set off the costs of construction incurred by the defendant under the TAs; and

(c) the defendant's counterclaim is dismissed.

[4] The plaintiffs filed their appeal vide appeal No N-02–2894–12 of 2012 and the defendant appeals against the dismissal of its counterclaim vide appeal No N-02–2967–12 of 2012. It must be noted that the parties are not appealing against the learned judge's finding that the TAs are void on the ground of frustration.

[5] The basis for the learned judge's order that the amount of RM868,297.52 received by the defendant from the plaintiffs shall be retained by the defendant is made pursuant to the exercise of Her Ladyship's discretion under the proviso to s 15(2) of the Civil Law Act 1956 ('the Act') that it is just and fair to allow the defendant to off-set the costs of construction of the WTP.

[6] At the conclusion of submissions we reserved our decision. We now give our decision. Having considered the appeal records and the submissions made by both parties it is our unanimous decision that appeal No N-02–2894–12 of 2012 be allowed and appeal No N-02–2967–12 of 2012 be dismissed. Our reasons are as follows.

SALIENT BACKGROUND FACTS

[7] The plaintiffs were owners and/or operators of pig farms on the land in and around the area of Bukit Pelandok and Tanah Merah in the District of Port Dickson. Sometime in the early 1990s the State Government of Negeri Sembilan decided to designate and develop a new pig farming area to be called the Integrated Pig Farming Area ('the IPFA') for Bukit Pelandok and its surrounding area.

[8] The defendant was chosen as the developer of the IPFA where, inter alia, it is to provide and construct a central waste treatment plant to treat the waste water from the pig farms. The plaintiffs' pig farms are outside the IPFA. It is not disputed that it is the state government's policy that all pig farming activities are to be allowed only in the IPFA. However the state authority seemed to relax the

policy and allowed those existing pig farms to continue operation provided they are connected to the defendant's Central Waste Treatment System ('the CWTS').

[9] Pursuant to this policy, the plaintiffs and the defendant entered into the two agreements, which are, the TAs and the service agreements ('the SAs') in respect of their respective lots. Under the TAs, the defendant agreed to allow the plaintiffs to tap into the defendant's Waste Treatment System ('WTS'). In consideration thereof, the plaintiffs agreed to pay tapping fees ('the fees') to the defendant calculated based on the 'Standing Pig Population' on each of the lots.

[10] The total fees payable by the plaintiffs under the TAs is RM2,383,450 out of which the plaintiffs had paid RM868,297.52 leaving a balance of RM1,515,152.48. The balance shall be paid by way of 36 monthly instalments. The plaintiffs also signed the SAs whereby they agreed that service fees would be paid to the defendant upon utilisation of the WTS.

[11] Unfortunately there was an outbreak of the Japanese Encephalitis disease ('JE') in 1998/1999 and Bukit Pelandok was one of the worst hit areas. The state government on 20 March 1999 *gazetted* the State of Negeri Sembilan to be a JE infected area and banned the rearing and sale of pigs in the affected areas.

[12] The defendant completed the construction of the treatment plant but was unable to commission it before the JE breakout. The defendant completed part of the sewage pipes within the IPFA but did not construct the pipes from the IPFA to serve the plaintiffs.

[13] It is the plaintiffs' case that they did not pay the balance due under the TAs because the state government had banned pig farming outside the IPFA after the JE outbreak. However the defendant claims that to accommodate the TAs they had to enlarge the size of the treatment plant which they would not otherwise have been required to do. The plaintiffs on the other hand contend that the defendant was obligated to construct the WTS pursuant to the privatisation agreement entered into between the defendant and the state government to develop the IPFA.

[14] The issue before us is whether in light of the background facts highlighted above the learned judge is correct in invoking s 15(2) of the Act. In our considered view the learned judge has erred in the application of s 15(2) of the Act. This is because under the TAs the costs of construction of the WTS are to be borne by the defendant (see cl 6.1 of the TA at p 350 of the appeal record). We agree with learned counsel for the plaintiffs that in order for s 15(2) to apply, the defendant bears the burden of proving that the expenses incurred by

the defendant were for the performance of the TAs. We find that the agreements and the minutes of the 'Mesyuarat Jawatankuasa Teknikal Cadangan Membangun Pusat Ternakan Khinzir (PFA) di Mukim Jimah, Port Dickson, Negeri Sembilan Darul Khusus' dated 10 May 1993 (p 1322 appeal record) show that the defendant was obliged to build the treatment plant to cater for both the PFA and the I PFA and to bear the costs of construction of that plant. Therefore we are of the view that the learned judge erred in finding that the construction of the treatment plant was an expense incurred in the performance of the TAs. Rather we find that it was an obligation imposed upon the defendant pursuant to the IPFA project.

[15] For the reasons stated above we allow appeal No N-02–2894–12 of 2012 and set aside the decision of the High Court. We order the defendant to refund to the plaintiffs the sum of RM868,297.52 with interests at 4% per annum from the date of the writ until full settlement. Consequently appeal No N-02–2967–12 of 2012 is dismissed. The decision of the High Court is affirmed. We make no order as to costs in both appeals. Deposits paid are to be refunded.

Order accordingly.

Reported by Ashok Kumar